FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 9 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased,
Petitioner,
vs.
PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,
Respondent.

No. 1084

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit

and

BRIEF IN SUPPORT THEREOF.

MARK D. EAGLETON,
E. V. CHAMPION,
WILLIAM H. ALLEN,
Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX

	Page
Petition for writ of certiorari	1–18
Opinions below	2
Summary statement of the matter involved	3
Jurisdiction of this Court	12
Questions presented	12
Reasons relied on for the allowance of the writ	14
Prayer	18
Brief in support of petition for certiorari	19–35
Opinions below	19
Statement of the case	19
Specifications of error to be urged	19
Summary of the argument	21
Argument	24
I.	
(1) Under the applicable decisions of this Court, the ruling of the Court of Appeals that there is no substantial evidence that Tennant's death proximately resulted, in whole or in part, from the negligence of respondent's engineer is erroneous, and constitutes a usurpation of the authority of the jury	24
(2) The evidence is to be viewed in the light most favorable to petitioner, giving her the benefit of every inference favorable to her that may be reasonably drawn from the evidence; it is the province of the jury to resolve all conflicts in the evidence, to pass upon the credibility of the witnesses and the weight of evidence; and if on any issue reasonable and fair-minded men may honestly draw different inferences from the evidence, the issue is one for the jury	25
(3) The finding of the jury on the issue of proximate cause must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts	26

(4) The applicable principles of law, when applied to the facts of the record, require a holding that the issues whether the engineer was negligent and whether Tennant's death resulted in whole or in part from such negligence were for the jury 26

(5) The ruling of the Court of Appeals that there is no evidence in the record to support the charge that Tennant's death proximately resulted from the negligence of respondent's engineer is not in accord with, but contrary to, the applicable decisions of this Court..... 32

Cases Cited.

Best v. District of Columbia, 291 U. S. 411, 416, 78 L. Ed. 888.....21, 25

Director General of Railroads v. Templin (3rd Cir.), 268 Fed. 483, 485.....23, 27

Gunning v. Cooley, 281 U. S. 90, 94, 74 L. Ed. 720..... 21

Milwaukee & St. Paul R. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256.....22, 26

Montgomery v. Baltimore and Ohio R. Co. (6th Cir.), 22 Fed. (2) 359.....22, 27

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 190-193, 58 L. Ed. 906.....21, 23, 25, 32

New Aetna Portland Cement Co. v. Hatt (6th Cir.), 231 Fed. 611, 617.....23, 31

New York Central R. Co. v. Marcone, 281 U. S. 345, 349, 74 L. Ed. 892.....21, 23, 25, 32, 33, 34

Seago v. New York Central R. Co., 315 U. S. 781, 86 L. Ed. 1188, 62 Sup. Ct. 306, reversing Seago v. New York Central R. Co., 348 Mo. 761, 155 S. W. (2) 126 .....23, 32

Story Parchment Co. v. Paterson Parchment Paper Co., 292 U. S. 555, 566, 75 L. Ed. 544.....22, 26

Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446 ..... 21, 23, 25, 32

Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 497, 498, 73 L. Ed. 473 ..... 21, 23, 25, 32

Statutes Cited.

Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) 3, 12, 14, 24, 35

Judicial Code, Sec. 240, as amended by Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28, U. S. C. A., Sec. 347 12

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

MARY TENNANT, Administratrix of the Estate of Harold C. Tennant, Deceased,
Petitioner,
vs.
PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Mary Tennant, administratrix of the estate of Harold C. Tennant, deceased, and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit rendered

and entered on the 31st day of March, 1943, in this case lately pending in said Court of Appeals, entitled Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, Plaintiff-Appellee, v. Peoria and Pekin Union Railway Company, a corporation, Defendant-Appellant, being cause No. 8128 of civil causes on the docket of said Court of Appeals, reversing a judgment of the United States District Court for the Southern District of Illinois, Northern Division, in said cause, in favor of your petitioner and against respondent herein.

OPINION OF THE COURT BELOW AND DISSENTING OPINION.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in said cause of Mary Tennant, Administratrix of the Estate of Harold C. Tennant, deceased, Plaintiff-Appellee, v. Peoria and Pekin Union Railway Company, a corporation, Defendant-Appellant, which petitioner here seeks to have reviewed, appears on pages 292 to 309, inclusive, of the printed transcript of the record filed herewith, and the dissenting opinion of Judge Kerner appears at page 309 of the record. Said opinions have not as yet been published.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was instituted by petitioner, Mary Tennant, administratrix of the estate of Harold C. Tennant, deceased, against respondent, Peoria and Pekin Union Railway Company, a corporation, on the 29th day of September, 1941, in the United States District Court for the Southern District of Illinois, Northern Division, under the Federal Employers' Liability Act (45 U. S. C. A. Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) to recover for the alleged wrongful death of said Harold C. Tennant, deceased, who, while in respondent's employ as a switchman, was run over and killed by a train being moved by respondent in its switching yard (R. 2), leaving surviving him a widow and a minor child, for whose benefit this suit was brought (R. 24, 25). Petitioner, plaintiff in the District Court, alleged in her amended complaint that Tennant's death was proximately caused by the negligence of respondent's employees in charge of the engine of said train in failing to ring the engine bell when the engine was about to move and in starting said engine without ringing the bell, in violation of a rule adopted and promulgated by respondent and then and there in force and effect, known as Rule 30, providing that "the engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents," and in starting said engine without ascertaining that Tennant was in a place of safety (R. 2-5).

As appears from the evidence and proceedings at the trial of the cause in the District Court, before the Court and a jury, Tennant was run over by respondent's train and instantly killed on July 12, 1940, while in respondent's employ as a member of a switching crew in one of respondent's East Peoria yards in the State of Illinois, known as the "B" yard. Respondent is and at the time of Ten-

nant's injury and death was a common carrier by railroad engaged in interstate commerce, and Tennant, at the time of his injury and death, was employed by respondent in such commerce (R. 17-19, 103-105).

On the night of the casualty the switching crew of which Tennant was a member consisted of Harkless, the foreman; England, the engineer or motorman; Cole, the fireman or motorman's helper; and two switchmen, Tennant and Bonner (R. 47). Tennant, referred to as the "pin puller," was the switchman who followed the engine (R. 53). Bonner was the field man (R. 78). The engine was a Diesel engine, electrically operated (R. 49). After the crew had done certain other switching, the engine, with no cars attached, was brought down from the north on a lead track and moved southwardly through divide switch B-28 and into track B-28 (R. 48, 49). The engine was headed south, that is, the front or pilot end was to the south (R. 49). Track B-28, south of B-28 switch, was a straight track extending approximately north and south (R. 50, 53), and was used as a classification track for bad order cars (R. 115). Upon this occasion, when the engine came "against" track B-28 from the north, there were twenty cars south of it on that track, in three or four different groups; the cars in each group being coupled together (R. 49, 228-230). These groups were to be coupled together and the twenty cars were to be then pulled northwardly up track B-28 and from that track to and upon the lead track and then northwardly and westwardly in the yard, and were to be ultimately placed on track 41, the repair track, also referred to as the "rip" track or "hammer" track (R. 54, 197). As the engine moved forward, southwardly, down track B-28, England, the engineer, was in his cab on the right side, the west side of the engine (R. 77, 78), and Cole, the fireman, was in his cab on the east side of the engine (R. 219). Tennant remained with the engine, and Harkless, the foreman, and

Bonner, the field man, went southwardly, down track B-28, on the engineer's side, the west side of the track (R. 51, 79). Harkless marked the "empties" and "loads" and Bonner released the brakes of the cars (R. 51). Tennant gave the signals for making the first coupling (R. 79, 228). The first car was standing about a car length south of B-28 switch (R. 93, 194, 228). Thereafter Bonner gave the engineer the signals for the couplings (R. 229). The engine was moved and stopped on signals from Bonner from time to time until all the cars on track B-28 had been coupled together (R. 229, 230). It was dark and the signals were given by lantern (R. 229). During this coupling work the engine came to a stop and started up again some six or eight times (R. 53). After some of the couplings had been effected the engine had hold of nine cars, all coupled together, and there was one remaining group of cars on track B-28 some distance farther south (R. 230). On signal from Bonner the engineer shoved the nine cars to the south and the last coupling was effected (R. 230, 231). The engineer testified that on this last coupling movement he shoved ahead, to the south, five or six car lengths (R. 196). When this coupling work had been finished and the train had come to a standstill, Harkless and Bonner were at the south end of the train, twenty car lengths from the engine on the west side of track B-28, the engineer's side (R. 52, 53); and the engineer was in his cab, looking to the south, watching for a backup signal (R. 197, 200). The engineer testified that the engine was then standing about five or six car lengths south of B-28 switch, a car being forty feet long (R. 197). Harkless testified that the train had pushed into track B-28 seven or eight car lengths in coupling up that track (R. 89). There was a brief wait, of about five or ten minutes, before the engineer received the backup signal, during which time the engine and train remained stationary (R. 79, 197, 231). It was during this interval

that Tennant was last seen alive. The engineer saw him on the west side of the track "alongside of the cab" of the engine, putting his raincoat under the cab in a compartment provided for clothes (R. 196). It had been raining (R. 196). And the engineer testified that when Tennant put his raincoat in this compartment, he got out his cap and jacket and put them on and then walked "around the engine," that is, to the north or rear of the engine, and that was the last he saw of him (R. 196, 197, 201); that he kept on looking south (201). Cole, the fireman, testified that during this wait he was sitting in his cab on the east side of the engine and keeping a lookout and that Tennant did not return on that side of the engine (R. 219). Harkless testified that it was Tennant's duty to stay with the engine (R. 53). Respondent's witness Stringer testified that the pin puller stays with the engine and if there is any movement of trains in the district he will go out and protect the engine and the lead (R. 156). Respondent's witness Hancock testified that it was the duty of the pin puller to stay at the head end and protect the next movement of the train (R. 166). Bonner testified that it was Tennant's duty to stay near the head end and attend to the switches and protect the cut and engine (R. 232). Shortly after Tennant was last seen by the engineer as aforesaid, Harkless, who was near the south end of the train, gave the engineer a backup signal (R. 54, 197, 233). At that time neither Harkless nor Bonner could see Tennant's light (R. 84, 233). In response to that backup signal the engineer immediately put his engine in motion, backing up and pulling the cars northwardly (R. 54, 199, 233). The undisputed evidence is that no bell was rung for that movement (R. 61, 199, 218).

On said backup movement the twenty cars were pulled out of track B-28, and the train was then moved north and west in the yard for a distance of about fifty car lengths until it was on the "middle lead" and far enough

north for the rear thereof to clear switch No. 41 leading into track No. 41 (R. 54, 56, 198). It was Tennant's duty to proceed through the yard to switch No. 41 and throw that switch to enable the engineer to shove the cars southwardly into track No. 41 (R. 55, 56, 197, 198). This was the regular routine (R. 198, 199). Upon this occasion Tennant did not show up at switch No. 41 to throw that switch (R. 55, 56). In the meantime, Harkless and Bonner, having ridden the train some distance north on track B-28, had dropped off and had gone across the yard to line switches (R. 54, 55). When the cars were not backed into track No. 41 as was contemplated, but the train remained stationary on the lead north of switch No. 41, Harkless walked up to the engine to investigate and, finding that Tennant's whereabouts were unknown, threw a switch to enable the crew to return with the engine to look for Tennant (R. 56). The engine was thereupon disconnected and the engineer, fireman and Harkless proceeded therewith back over the same route that the train had previously been moved, finally moving into and southwardly on track B-28 (R. 56). On this return trip Tennant's body was discovered at the B-28 divide switch, on the outside of the west rail of track B-28 (R. 56). His head and right hand were missing (R. 56, 57). The engine was stopped seven or eight feet north of the body and members of the crew then walked southwardly and found Tennant's lantern, still lighted, his right hand and his cap and a large pool of blood on the track, the pool of blood being close to the west rail (R. 57, 58). The crew then went back northwardly with the engine a distance of some fourteen car lengths north and west of B-28 switch and there found Tennant's head lying in a switch frog (R. 65).

Harkless testified that the hand, lantern, cap and pool of blood were about seven or eight car lengths south of B-28 switch where the torso was found (R. 58). He further testified that the place where the hand, cap, lantern

and pool of blood were found was about the place where the engine was stopped after the last coupling had been made on track B-28 (R. 58). He further testified that he stepped off the distance from B-28 switch to where the hand, lantern, cap and blood were found and that it was approximately three hundred feet (R. 89).

One Keeler, respondent's assistant superintendent, testified that after the casualty he made an investigation and found some blood on the outside of the ball of the west rail of track B-28 about 315 feet south of B-28 switch (R. 137); that about a foot and a half north of that mark there was some blood, and near by, between the rails, was Tennant's right hand and his lighted lantern (R. 137, 138). He inspected Tennant's shoes and the engine footboards and found no evidence of anyone having slipped (R. 139); and inspected the wheels of the cars and found no blood on them, but found a tiny bit of flesh on the outside rim of the north wheel of the third car from the engine (R. 138). Respondent's chief engineer, Thornberry, also made an investigation and testified that the first blood mark found on the rail was 317.6 feet south of B-28 switch, and that nothing was found south of that (R. 113). Respondent's general roundhouse foreman, Romann, examined the engine after the casualty and found no blood or flesh on the wheels thereof and no evidence on the footboards of any "shoe slipping" (R. 186).

Respondent's rules, issued in its rule book in 1929, consisted of the standard set of rules theretofore adopted by the Association of American Railroads (R. 132). Rule 30 thereof, read in evidence, provided that the "engine bell must be rung when the engine is about to move" (R. 60, 61). Harkless testified that it had long been the practice and custom in this yard that when a member of the crew was missing the engine bell would be rung and the engine would not be moved while the man was missing (R. 62);

that it was the custom and practice in the yards to ring the bell when the engine stopped and started (R. 80); though engineers did not always ring the bell in the course of coupling operations (R. 81, 82). He further testified that when an engine had stopped on a track and was about to start in motion they would always ring the bell (R. 93). His attention was called to Rule 32—later introduced in evidence by respondent (R. 117)—providing that "the unnecessary use of either the whistle or bell is prohibited," and he testified that Rule 32 meant that the continual ringing of the bell in the yard was prohibited (R. 99), but that when you are about to start up, under the requirement of Rule 30 the bell must be rung (R. 100); that the ringing of the bell of a standing engine, preparatory to starting, was meant as a warning to everybody around the engine that it was about to move (R. 102).

Respondent's witness Keeler, over petitioner's objections (R. 118, 119), testified that he had instructed respondent's employees from time to time, including Tennant, that Rules 30 and 32 were to be read together and that it was not necessary for the bell to be rung every time an engine started (R. 119-121). On cross-examination he said it was always necessary to ring the bell when the engine was about to move (R. 134), but said he told the men that the bell would not always be rung, because at places where there are many engines, all ringing a bell, the bell is useless (R. 135). There was but the one engine working in the yard at the time of this casualty (R. 93).

And over petitioner's objections (R. 141) respondent adduced the testimony of a number of its employees as to their instructions regarding Rules 30 and 32. There was testimony that the employees were told that the rules were elastic and to use their own judgment (R. 143); that they were instructed to ring the bell if necessary (R. 145), but not unless it was necessary (R. 162), and that it was left

to the engineer's discretion to determine when it was necessary (R. 168); that the bell was rung only at grade crossings and where men other than members of the crew were working about the track (R. 154, 214), and not in the yards unless the engineer knew that some one was in a position of danger (R. 141, 142, 154, 181, 184); that bells were not rung where there was continual switching of cars (R. 147, 148) or during coupling operations (R. 178), and that the bell was not to be rung continuously while an engine was either in motion or standing, such use of the bell being eliminated so that a man can hear a bell when an engine is about to start from a standing position (R. 164). Cole, the fireman of this train, testified that no superintendent or other officer had ever told him that Rule 30 pertained only to track men and others not members of the crew (R. 221). All of respondent's employees who were interrogated as to the matter said they were instructed to obey the written rules of the company (R. 144, 146, 150, 160, 176, 221).

Witnesses for respondent denied that it was the custom and practice in the yards for an engineer not to move his engine upon signal until he knew that every member of the switching crew was in a place of safety (R. 128, 142, 146, 148, 155, 163, 169, 179, 180-82). England, the engineer of this train, at first testified that this was the custom and practice; that he always practiced that (R. 189, 190), but then changed his testimony and denied that such was the practice (R. 190). It was shown that in a deposition he had testified that such was the custom and practice (R. 203, 204), and that in a written statement signed by him he had stated that it was the usual practice and custom that a train should not be moved while a man was missing (R. 242-244).

The trial of said cause in the District Court resulted in a verdict and judgment on May 7, 1942, in favor of petitioner (plaintiff) and against respondent (defendant) in

the sum of $26,250.00 (R. 263). Thereafter respondent, in due course, appealed said cause to the United States Circuit Court of Appeals for the Seventh Circuit (R. 269-278), where said appeal was perfected, and the cause was, on the 19th day of January, 1943, argued by counsel and submitted upon said argument and briefs of counsel, and was taken under advisement by the Court (R. 291). Thereafter, on March 31, 1943, said Court of Appeals filed an opinion in said cause written by Judge Major of said court and concurred in by one other member of the court, Judge Sparks, wherein the Court ruled that, though there was evidence of negligence on the part of respondent's engineer in failing to ring the bell before putting the engine in motion on said fatal movement, there is no substantial proof in the record that such negligence was the proximate cause of the death of petitioner's intestate, Tennant, and that consequently the District Court should have directed a verdict in favor of respondent or should have allowed respondent's motion for judgment notwithstanding the verdict (R. 292-309). And on said 31st day of March, 1943, said Court of Appeals entered judgment in said cause, in accordance with the above-mentioned opinion, reversing said judgment of the District Court in favor of petitioner and remanding the cause to the District Court with directions to that Court to enter judgment in favor of respondent. (R. 310).

And on said March 31, 1943, his Honor, Judge Kerner, one of the Judges of the said Court of Appeals before whom said cause had been argued, filed in said cause a dissenting opinion wherein he held that the case made was one for the jury, and that the judgment of the District Court should be affirmed (R. 309).

Thereafter, on the 12th day of April, 1943, and within the time allowed therefor by the rules of said Court of Appeals, petitioner duly filed in said cause, in said Court of Appeals, her petition for a rehearing of said cause (R.

311); and on April 16, 1943, respondent filed its answer to said petition (R. 323).

And thereafter, on the 13th day of May, 1943, petitioner's said petition for a rehearing of said cause was by said Court of Appeals denied, whereby and on which day said judgment of said Court of Appeals in said cause became final (R. 335).

The duly certified record, including all of the proceedings in said cause, in said District Court and in said Court of Appeals, is filed herewith under separate cover, together with the requisite number of printed copies thereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Title 28, U. S. C. A., Sec. 347, providing for review by this Court, by certiorari, of decisions of the Circuit Courts of Appeals. The judgment of the United States Circuit Court of Appeals for the Seventh Circuit here sought to be reviewed was entered on March 31, 1943 (R. 310). A petition for a rehearing was duly filed by this petitioner, appellee in said Circuit Court of Appeals, on April 12, 1943, within the time provided by the rules of said Circuit Court of Appeals (R. 311), and said petition for a rehearing was denied by said Circuit Court of Appeals on May 13, 1943 (R. 335).

QUESTIONS PRESENTED.

The questions presented by petitioner's petition herein for a writ of certiorari are:

(1) Whether in this case, an action against a carrier by railroad under the Federal Employers' Liability Act (45 U. S. C. A., Section 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), to recover for the death of a switchman who was run upon and killed by a train of the defendant at

night in its switching yard while employed by the defendant in interstate commerce, the evidence adduced at the trial of the cause, hereinabove summarized, with the inferences fairly and reasonably arising therefrom, sufficed, under the applicable decisions of this Court, to warrant the submismission to the jury of the issue whether the death of said deceased proximately resulted, in whole or in part, from the negligence of respondent's engineer in charge of the engine of said train who, after having seen the deceased go "around the engine," to the rear end thereof, and without knowing whether he was in a place of safety, negligently moved said engine backward from a stationary position without the ringing of the engine bell in violation of a rule of respondent providing that "the engine bell must be rung when an engine is about to move" and contrary to the custom and practice in said yard, or whether the evidence adduced constituted no substantial evidence to take said issue of proximate cause to the jury as held in the opinion of the Court of Appeals herein, rendered by a majority of the Judges thereof sitting at the hearing of the cause in that Court, and upon which ground alone that Court reversed the judgment of the District Court herein in favor of this petitioner.

(2) Whether, by the opinion and judgment of the Court of Appeals in this cause, petitioner was denied a right to which she is lawfully entitled under the Federal Employers' Liability Act, namely, the right, specifically set up and claimed by her, to have a jury pass upon the question whether, under the evidence adduced in this cause, the injury and death of said deceased, while employed by respondent in interstate commerce, resulted in whole or in part from the negligence of respondent's engineer in putting his engine in backward motion without the ringing of the bell, in violation of respondent's rule and contrary to the custom and practice in the yard.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In this case the action is one under the Federal Employers' Liability Act (45 U. S. C. A., Section 51, Act of April 22, 1908, c. 149, sec. 1, 35 Stat. 65) to recover for the death of a railway employee, a switchman employed by respondent in interstate commerce, by reason of having been run upon and killed by a train of respondent herein, and alleged to have resulted from the negligence of respondent's engineer in charge of the engine of said train in starting said engine backward from a stationary position without the ringing of the engine bell, in violation of a rule of respondent providing that "the engine bell must be rung when the engine is about to move," and contrary to the custom and practice in said yard. It was undisputed that upon the fatal movement the engine was put in backward motion without the ringing of the bell, after it had been standing stationary for five or ten minutes, and after the engineer had seen the deceased go "around the engine," to the rear end thereof, and without the engineer knowing whether the deceased was in a position of safety, and that the deceased was thereupon run upon, cut to pieces and killed; and evidence was adduced at the trial of said cause which, with the inferences fairly and reasonably to be deduced therefrom, tended with great force to show that the death of said deceased proximately resulted from said negligence of respondent's engineer. Nevertheless, the Court of Appeals for the Seventh Circuit, in the majority opinion of that Court in said cause, though holding that there was evidence of negligence on the part of the engineer, ruled that there was no substantial proof that such negligence was the proximate cause of the death of said deceased, and upon that ground alone reversed the judgment of the District Court in favor of petitioner (R.

292-309). Said ruling on the issue of proximate cause is erroneous and not in accord with the applicable decisions of this Court holding that on the question of whether a case is one for the jury the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to the plaintiff that may be fairly and reasonably drawn from the evidence; that all conflicts in the evidence are to be resolved in favor of the plaintiff; that the credibility of the witnesses and the weight to be given to their testimony are for the jury; and that if on any determinative issue in the case reasonable and fair-minded men may honestly draw different conclusions from the evidence, such issue is not one of law for the court, but one of fact for the jury. And said ruling is not in accord with, but is directly contrary to, the applicable decisions of this Court holding that what is the proximate cause of an injury is ordinarily a question for the jury, to be determined as a fact in view of the circumstances of fact attending it, and that the finding of the jury upon that question must stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts.

(2) In this case, wherein petitioner, widow of Harold C. Tennant, deceased, and administratrix of his estate, claimed the right, as such administratrix, to recover under the Employers' Liability Act for the death of said Tennant, who was run upon and killed by a train of respondent at night in its switching yards while employed by respondent as a switchman in interstate commerce, the evidence adduced at the trial of the cause in the District Court showed that respondent's engine, headed south, that is, with the pilot end to the south, moved southwardly through switch B-28 and into track B-28 in respondent's yard in order to couple together certain groups of cars on that track, consisting of twenty cars in all, and then pull

the cars northwardly out of said track and take them to another part of the yard; that Tennant was the switchman who followed the engine, and it was his duty to remain with the engine and protect it from the movement of other engines and cars on the track; that after the groups of cars had been coupled together there was a brief wait, of five or ten minutes, during which the train remained stationary, and during that time respondent's engineer was in his cab on the west side of the engine, looking south, awaiting a backup signal; that during this brief waiting period the engineer saw Tennant on the west side of the track "alongside of the cab" of the engine, saw him put his raincoat and hat in the compartment of the cab, put on his jacket and cap "and walk around the engine" to the north or rear end thereof, whereupon he disappeared from the engineer's view and was not afterwards seen alive by anyone; that a few minutes later the engineer did receive a lantern backup signal from a switchman near the south end of the train and immediately put his engine in reverse motion, backing it northwardly up the track, without the ringing of the bell, in violation of a rule of respondent providing that "the engine bell must be rung when an engine is about to move," and contrary to the practice and custom in said yard, and without taking any steps to ascertain whether Tennant was in a place of safety, whereupon Tennant was run upon, cut to pieces and killed; that it was not known that Tennant had been killed until after said train had been moved north and west in the yard a distance of about fifty car lengths and after members of the crew had returned with the engine to look for Tennant, whereupon his remains were found at different places upon the track; and that the place where he was run upon was shown by the location of his severed right hand, his lantern and cap and the large pool of blood on the track, which were in the immediate vicinity

of where the engine stood before making said fatal backup movement. Such evidence, with the inferences arising therefrom, amply warranted the jury in finding that Tennant's death resulted in whole or in part from the said negligence of defendant's engineer. The decision of the Court of Appeals for the Seventh Circuit that, though the failure to ring the bell when said engine was about to move constituted evidence of negligence, there was no substantial proof that such negligence proximately caused or contributed to cause Tennant's death, is plainly not in accord with the applicable decisions of this Court. Such decision is clearly violative of the fundamental principles to be observed in passing upon a request for a directed verdict as announced and applied in a long line of decisions of this Court. It is a matter of prime public importance that the rights vouchsafed to railroad employees and their dependents by the benign provisions of the Federal Employers' Liability Act be fully recognized, protected and enforced by every court in the land in which an action may lawfully be brought under the act. To that end, and to the end, too, that right and justice may ultimately prevail in this case, this Honorable Court's writ of certiorari should issue herein.

(3) The United States Circuit Court of Appeals for the Seventh Circuit, by its said opinion and judgment in this cause, denied petitioner a right, specifically set up and claimed by her as the administratrix of her deceased husband's estate, to which she is entitled under the Federal Employers' Liability Act, namely, the right to have the judgment of a jury on the question whether the injury and death of said deceased, while employed by respondent in interstate commerce, resulted, in whole or in part, from the said negligence of respondent's engineer, when there was evidence rightfully engendering that conclusion and re-

quiring the submission of that issue to a jury. It is respectfully submitted that the denial to petitioner of such right plainly calls for the issuance by this Court of its writ of certiorari.

PRAYER.

Wherefore petitioner prays that a writ of certiorari be issued by this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit to the end that said opinion and judgment of said Court of Appeals in said cause of Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased, Plaintiff-Appellee, v. Peoria and Pekin Union Railway Company, a corporation, Defendant-Appellant, No. 8128 in said Court of Appeals, be reviewed by this Court, as provided by law, and that upon such review said judgment of said Court of Appeals be reversed, and that petitioner have such other relief as this Court may deem appropriate.

Respectfully submitted,

MARK D. EAGLETON,

E. V. CHAMPION,

WILLIAM H. ALLEN,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW, AND DISSENTING OPINION.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit in said cause of Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased, Plaintiff-Appellee, v. Peoria and Pekin Union Railway Company, a Corporation, Defendant-Appellant, which petitioner here seeks to have reviewed, appears on pages 292-309, inclusive, of the printed transcript of the record filed herewith. And the dissenting opinion of Judge Kerner in said cause appears on page 309 of the record. Said opinions have not, as yet, been published.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in petitioner's petition for a writ of certiorari herein, and in the interest of brevity are not repeated here. Reference will be made to such facts, on the points involved, in the course of the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED.

The United States Circuit Court of Appeals for the Seventh Circuit, in the majority opinion of that Court in this cause, erred:

(1) In holding and deciding that the evidence adduced at the trial of said cause in the District Court did not suffice to make the case one for the jury under the Federal Employers' Liability Act.

(2) In holding and deciding that no substantial evidence was adduced at the trial of said cause in the District Court to warrant the submission to the jury of the issue whether the negligence of respondent's engineer, in putting his engine in motion without the ringing of the bell and without taking any steps to ascertain whether the deceased was in a place of safety, proximately caused or contributed to cause the death of said deceased.

(3) In holding and deciding that, under the evidence adduced at the trial of said cause, the cause of the death of said deceased was left to speculation and conjecture.

(4) In reversing the judgment of the District Court and remanding the cause to that Court with directions to enter judgment in favor of the defendant, respondent herein.

SUMMARY OF THE ARGUMENT.

I.

(1)

The ruling of the Court of Appeals that—though there was evidence to support a finding that respondent's engineer was negligent in putting his engine in backward motion without the ringing of the bell in violation of respondent's rule and contrary to the custom and practice of the yard—there is no substantial proof in the record to support the charge that Tennant's death proximately resulted, in whole or in part, from such negligence, is erroneous and out of accord with the applicable decisions of this Court.

(2)

On the question whether a jury case is made, the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be reasonably drawn from the evidence. It is the province of the jury to resolve all conflicts in the evidence and to pass upon the credibility of the witnesses and the weight to be given to their testimony. And if, on any determinative issue in the case, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, such issue is one for the jury.

Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446;
New York Central R. Co. v. Marcone, 281 U. S. 345, 349, 74 L. Ed. 892;
Gunning v. Cooley, 281 U. S. 90, 94, 74 L. Ed. 720;
Best v. District of Columbia, 291 U. S. 411, 416, 78 L. Ed. 888;
Myers v. Pittsburgh Coal Co., 233 U. S. 184, 190-193, 58 L. Ed. 906;
Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 497, 498, 73 L. Ed. 473.

(3)

What is the proximate cause of an injury is ordinarily a question for the jury, to be determined as a fact in view of the circumstances of fact attending it; and the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts.

Milwaukee & St. Paul R. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256;
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 566, 75 L. Ed. 544.

(4)

Under the evidence in this record, considered in the light of the above mentioned principles, whether the engineer was guilty of negligence in putting his engine in motion under the circumstances without a ringing of the bell, and whether Tennant's death proximately resulted, in whole or in part from such negligence, if any, were questions for the jury.

(a)

Rule 30 is a clear and explicit rule, requires no construction, and of itself constitutes substantial evidence that reasonable care requires the precaution that the rule directs.

Montgomery v. Baltimore and Ohio R. Co. (6th Cir.), 22 Fed. (2) 359.

(b)

The evidence relating to the rule and the custom and practice in the yard amply warranted a finding that Tennant was entitled to rely upon a warning by the bell before the engine was put in motion. And since he is dead, the

presumption prevails, in the absence of evidence to the contrary, that he did rely thereupon.

Director General of Railroads v. Templin (3rd Cir.), 268 Fed. 483, 485.

(c)

Since there was evidence that it was Tennant's duty to remain with the engine and protect it and the train from other movements on that track, the law indulges the presumption that at the time of his death he was in the performance of such duty.

New Aetna Portland Cement Co. v. Hatt (6th Cir.), 231 Fed. 611, 617.

(5)

The ruling of the Court of Appeals in this case is out of accord with many applicable decisions of this Court, among which are:

Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446;

New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892;

Seago v. New York Central R. Co., 315 U. S. 781, 86 L. Ed. 1188, 62 Sup. Ct. 306, reversing Seago v. New York Central R. Co., 348 Mo. 761, 155 S. W. (2) 126;

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 58 L. Ed. 906;

Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473.

ARGUMENT.

I.

This is an action under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), brought by the widow of Harold C. Tennant, deceased, as administratrix of his estate, to recover damages for the alleged wrongful death of said deceased, charged to have been proximately caused by the negligence of respondent's engineer in starting an engine and train from a stationary position at night in respondent's switching yard without the ringing of the engine bell, in violation of respondent's rule 30, providing that the engine bell must be rung when an engine is about to move and contrary to the custom and practice in the yard, and in starting said engine without ascertaining whether the deceased, a switchman, was in a place of safety.

Section 51 of Title 45, U. S. C. A., supra, provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."

The trial of said cause in the District Court resulted in a verdict and judgment in favor of the plaintiff, this petitioner. On the appeal of the defendant, this respondent, to the United States Circuit Court of Appeals for the Seventh Circuit, that Court, in an opinion by Judge Major, Circuit Judge, concurred in by Judge Sparks, Circuit Judge,

held—though evidently with reluctance—that the failure of the engineer to ring the bell before putting the engine in motion, as to which there was no dispute, constituted evidence of negligence (R. 298-303), but held that there is no substantial proof in the record to support the charge that such negligence was the proximate cause of the death (R. 303-309). Petitioner submits that, in the light of the applicable decisions of this Court, said last-mentioned ruling is, upon this record, plainly erroneous, and that by such ruling the Court usurped the function and authority of the jury.

(2)

It is the well-settled rule of decision of this Court that on the question whether a case was made entitling the plaintiff to the judgment of a jury the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that it is the province of the jury to resolve all conflicts in the evidence and to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on any determinative issue in the case, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, such issue is one for the jury. Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446; New York Central R. Co. v. Marcone, 281 U. S. 345, 349, 74 L. Ed. 892; Gunning v. Cooley, 281 U. S. 90, 94, 74 L. Ed. 720; Best v. District of Columbia, 291 U. S. 411, 415, 416, 78 L. Ed. 888; Myers v. Pittsburgh Coal Co., 233 U. S. 184, 190-193, 58 L. Ed. 906; Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 497, 498, 73 L. Ed. 473.

(3)

And it is also the settled rule of decision of this Court that what is the proximate cause of an injury is ordinarily a question for the jury, to be determined as a fact in view of the circumstances of fact attending it, and that the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts. Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256; Story Parchment Co. v. Paterson Parchment Paper Co. et al., 282 U. S. 555, 566, 75 L. Ed. 544.

(4)

It is submitted that a proper application of these established principles of law to the evidence in this record plainly required a holding by the Court of Appeals that the issue of proximate cause as well as that of negligence was one for the jury; and that the jury having resolved both of said issues in favor of this petitioner, plaintiff below, the Court was not lawfully at liberty to disturb the jury's finding on either of them.

We mean no disrespect to the Honorable Judges of the Court of Appeals who promulgated the majority opinion of the Court herein when we say that therein the Court rendered lip service to the rule that upon a defendant's motion for a directed verdict the evidence must be taken most strongly against the defendant and viewed in the light most favorable to the plaintiff, but utterly failed to apply the rule to the facts of the record before the Court, utterly failed to realize that a proper application of the principles hereinabove stated to the evidence adduced would compel a holding that the issue of proximate cause, as well as that of negligence, was one for the jury and was concluded by the jury's verdict.

Since the Court of Appeals came to the conclusion that there was evidence of negligence on the part of respondent's engineer (R. 303), the evidence relating to that issue need not be considered except as it may have a bearing also upon the issue of proximate cause. As to whether Tennant was entitled to rely upon the observance of the rule and custom, it may be noted that Rule 30, one of a set of standard rules long ago adopted by the Association of American Railroads (R. 132), is a clear and explicit rule, requires no construction, and of itself constitutes substantial evidence that reasonable care requires the precaution that the rule directs (Montgomery v. Baltimore and Ohio R. Co. [6th Cir.], 22 Fed. [2] 359). And though respondent was permitted to undertake to make it appear that the rule did not mean what it said, and was not to be taken seriously, there is abundant evidence in this record that both the rule and the custom and practice in the yard required that the engine bell be rung when an engine was about to move after having stood for a time in a stationary position, as upon the occasion here in question. Petitioner adduced positive testimony to that effect (R. 60, 61, 80, 93), and this was corroborated by respondent's star witness, Keeler (R. 134). It matters not that engineers did not always observe the rule. And such conflicts as there were in the evidence as to the custom and practice were for the jury. It follows that a jury could, with perfect propriety, find that when Tennant walked "around" the standing engine, to the rear end thereof (R. 196, 197), he was entitled to rely upon the observance of such rule, custom and practice. And Tennant being dead, in the absence of evidence to the contrary the presumption prevails that he did rely thereupon (Director General of Railroads v. Templin [3rd Cir.], 268 Fed. 483, l. c. 485).

During the period of five or ten minutes that the engine stood stationary after the switching had been com-

pleted on track B-28 and while the engineer was awaiting a back-up signal from the south end of the train, the engineer saw Tennant put his raincoat and hat in the compartment of the cab on the west side of the track and saw him then walk northward "around the engine," to the north or rear end thereof (R. 196). He did not return on the fireman's side (R. 219), and was never again seen alive. It appears that the Court of Appeals reached its said conclusion on the issue of proximate cause largely because no testimony could be produced as to Tennant's exact position and what he was doing at the very instant when the engine was suddenly put in backward motion without warning and he was run upon and killed. But it is clear that the lack of such testimony affords no sound reason for the Court's said conclusion, for any movement of the engine without warning was fraught with danger, and the evidence, with the inferences readily springing therefrom, amply warranted the jury in finding that Tennant, having gone around to the rear of this engine, and being then and there presumably in the performance of his duty as we shall show, was entitled to the protection designed to be afforded by the rule and custom and relied thereupon, and that the failure to observe the rule and custom proximately caused or contributed to cause his death. Recovery is not denied in cases of this character merely because the deceased did not have at hand an eyewitness to the casualty.

There was no such mystery as to Tennant's location when run upon as to effect petitioner's right to recover for his death, as the Court seems to have thought (R. 304, 305). Not only did the undisputed evidence show that a very short time before he was run upon and killed he went around to the north end of the engine, but the testimony as to the place where the engine then stood, and the place upon the track where Tennant was run upon, as shown by

the location of his severed right hand, cap, lantern and the pool of blood after the casualty, fully sufficed to warrant the jury in finding that when run upon he was at or about the north or rear end of the engine.

There was testimony that the hand, cap, lantern and the pool of blood were about the place where the engine stood after the coupling movement had been made (R. 58). According to the testimony of Harkless, who stepped off the distance, the hand, cap, lantern and pool of blood were about 300 feet south of B-28 switch (R. 89). According to testimony of respondent's witnesses the blood was 315 feet (R. 137) or 317.6 feet (R. 113) south of that switch. In the course of the coupling operations the engine had made a number of moves southwardly on track B-28. Harkless testified that the train had pushed **seven or eight car lengths** in coupling up that track (R. 89), a car being forty feet long (R. 197). The evidence as a whole obviously sufficed to warrant the jury in finding that Tennant was at or about the rear end of this engine when it was suddenly run upon him without warning.

What has just been said makes it quite clear that the learned author of the opinion of the Court of Appeals herein was not justified in proceeding on the theory that the blood on the track was found "a distance of from 80 to 120 feet south of where the engine stood prior to the fatal movement" (R. 307). That theory was based upon a bit of testimony of the engineer, a witness for respondent, that the engine, prior to the fatal movement, was standing five or six car lengths south of switch B-28 (R. 197, 307). That testimony is at variance with the testimony mentioned above showing that before the last stop the engine had moved **seven or eight car lengths south of B-28 switch.** And it is not in keeping with the engineer's own testimony that **on the last southward movement alone,** made to couple to the last group of cars that stood far

down track B-28, **the engine moved five or six car lengths** (R. 196); for in the course of the coupling work the engine had previously made two or three southward movements (R. 49, 228, 230).

And in reaching its said conclusion as to the issue of proximate cause, the Court of Appeals proceeded upon another untenable theory. The Court stated that "it is undisputed that the deceased at that time had no further duty to perform on or about the engine and that he was next required to be at switch 41" (R. 305), and that "there is no dispute in the evidence but that the deceased was not in the performance of any duty at the time of his death" (R. 306). **The record does not justify such statements.** There is nothing in the evidence to indicate that Tennant departed or stepped aside from the general course or line of his duty. And, as petitioner pointed out in her petition for a rehearing herein (R. 315, 316), respondent's own witnesses testified that it was Tennant's duty to remain with the engine and protect it and the train from the movement of any other train or any engines or cars on that track (R. 156, 166, 232). Such testimony went unnoticed in the opinion. While it appeared that it was Tennant's duty to timely proceed to switch No. 41 in another part of the yard and throw that switch after the train had been backed northwardly and westwardly, and was ready to be shoved from a lead track down track 41, it did not by any means conclusively appear that when the last coupling had been effected and the train stopped it became Tennant's duty to immediately abandon the engine and proceed to switch No. 41 while the train remained standing and while the engineer continued to look south for a backup signal; if, indeed, there may be said to be any substantial evidence to that effect. A jury could properly conclude that Tennant's duty to remain with the engine and protect it and the cut of cars from movements on that track continued, not only while

the coupling operations were in progress, but during the brief period thereafter when the train remained stationary and the engineer was engrossed in keeping a watch to the south for a backup signal, Tennant did remain with the engine. And since his lips are closed in death, in the absence of any evidence to the contrary, the law indulges the presumption that he was in the performance of the duty then and there resting upon him (New Aetna Portland Cement Co. v. Hatt [6th Cir.], 231 Fed. 611, 617). It matters not how he happened to be so situated as to be run upon. The presumption is that he was in the exercise of due care for his own safety; though such presumption is not here needed since contributory negligence would not bar a recovery under the act, and, for that matter, is not, under the pleadings, an issue in this case for any purpose.

It is submitted that under the evidence adduced a jury could well conclude that **a single tap of the bell of this engine would have sufficed to save Tennant's life; that his death proximately resulted from the failure of the engineer to take the trouble to reach for the bell cord when he was about to put the engine in motion, as was his duty.**

The questions before the Court of Appeals were, in our judgment, completely and properly resolved by the brief dissenting opinion of Judge Kerner herein as follows:

> "Any movement of the engine without warning was dangerous to life and limb. In addition to the fact that no bell was rung at the time the engineer started to move the engine and that he did not know where Tennant was, there was also evidence that it was the practice and custom not to move an engine when a member of the crew was missing unless the bell was rung as a warning before starting the engine.
>
> "I think it was permissible inference by the jury that the failure to sound the bell was the proximate cause of Tennant's death, and that the inference to be drawn from all the evidence as to the existence of

the custom, its purpose and the reliance which Tennant under all the circumstances was entitled to place upon it, was for the jury. Consequently, the judgment ought to be affirmed" (R. 309).

(5)

Upon the evidence in this record the ruling of the Court of Appeals complained of is plainly out of accord with the applicable decisions of this Court, some of which are: Tiller v. Atlantic Coast Line R. Co., 63 Sup. Ct. Rep. 444, 87 L. Ed. 446; New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892; Seago v. New York Central R. Co., 315 U. S. 781, 86 L. Ed. 1188, 62 Sup. Ct. Rep. 306, reversing Seago v. New York Central R. Co., 348 Mo. 761, 155 S. W. (2) 126; Myers v. Pittsburgh Coal Co., 233 U. S. 184, 58 L. Ed. 906; Western & Atlantic R. Co. v. Hughes, 278 U. S. 496, 73 L. Ed. 473.

In **Tiller v. Atlantic Coast Line R. Co., supra, 63 Sup. Ct. Rep. 444, 87 L. Ed. 446**, decided by this Court on February 1, 1943, the action was one under the Federal Employers' Liability Act to recover for the death of Tiller, who was a policeman for the defendant railroad company. While inspecting, at night, the seals on slowly moving cars on one track, Tiller was struck and killed by a train that was backed on an adjoining track in the yard; the space between the moving cars being three feet seven and one-half inches. There was no eyewitness to the casualty. The automatic bell of the engine backing the train on the adjoining track was ringing. The rear of that train was unlighted, though a brakeman with a lantern was riding on the side away from Tiller. No special signal or warning was given. In ruling that the case should have been submitted to the jury, this Court said:

"Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury

system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee etc. R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. Or, as we have put it on another occasion, 'Where the facts are in dispute and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."

The opinion of the Court of Appeals in the instant case is plainly out of accord with this Court's decision in the Tiller case. In this case the evidence warrants a finding of negligence attributable to the defendant employer as for failure to warn of the impending movement, as did the evidence in the Tiller case—though the evidence of negligence is here more pronounced than in the Tiller case, since it does not appear that in the latter the failure to give a special warning was a violation of a rule or custom. And in this case the question whether the negligence of respondent's engineer proximately caused or contributed to cause the death rests upon inferences that a jury may lawfully draw from the evidence, as did that issue in the Tiller case. The Tiller case makes plain the unsoundness of the ruling of the Court of Appeals herein that, under the evidence here adduced, the jury should not have been permitted to pass upon that issue.

In **New York Central R. Co. v. Marcone, 281 U. S. 345, 74 L. Ed. 892**, the deceased, whose duty it was to lubricate and service engines in the defendant's roundhouse, was run over and killed by an engine that had been lubricated and serviced and was being removed from the roundhouse by an engine hostler. "There was no eyewitness to the accident" (281 U. S., l. c. 347). The deceased's body was found upon the track after the engine had passed over it. The hostler had sounded the engine whistle, but there was

a brief wait thereafter before the fatal movement. There was not a word of testimony as to what the deceased was doing or attempting to do at the precise instant of the casualty. He had no further duty to perform in connection *with that particular engine.* This Court, in an opinion by Mr. Justice Stone, now Chief Justice, held that the case was one for the jury, and, among other things (281 U. S., l. c. 349, 350), said:

> "Any movement of an engine without warning was dangerous to life and limb. After the hostler mounted the engine, and before it was moved, sufficient time elapsed for the deceased to come into proximity with it, which was dangerous if, as the jury might have found, he could not be seen from the engine cab by the hostler and was not warned of the impending movement. On the evidence it was for the jury to say whether petitioner exercised due care in moving the engine without a more specific and effective warning and whether failure to give it was the cause of the death."

By the same token, in the instant case the issues of negligence and proximate cause were for the jury. In the instant case, as said by Judge Kerner in his dissenting opinion, any movement of the engine without warning was dangerous to life and limb. Tennant could not be seen from the engine cab by the engineer and was not warned of the impending movement, despite the fact that the rule, custom and practice required such warning. It follows that the decision of the Court of Appeals herein is out of accord with the decision of this Court in the Marcone case.

In order not to further extend this brief we refrain from discussing other applicable decisions of this Court cited above. The cases relied upon by the Court of Appeals in its opinion (R. 307, 308) are, in our judgment, hege far afield. It is plain, we submit, that the effect of the ruling

of the Court of Appeals herein, that a jury may not be permitted to determine whether Tennant's death resulted in whole or in part from the negligence of respondent's engineer, is not only to deprive petitioner of a right accorded to her by the Employers' Liability Act, but to deny her the right of trial by jury vouchsafed to her by the Constitution of the United States.

Petitioner therefore prays that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, rendered herein on the 31st day of March, 1943, and which became final by the overruling of petitioner's petition for a rehearing on May 13, 1943, be reversed.

Respectfully submitted,

MARK D. EAGLETON,

E. V. CHAMPION,

WILLIAM H. ALLEN,

Counsel for Petitioner.